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No. 89-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYLVIA EVANS, BERTHA BALARK, and CURTIS COLLUM, individually and on behalf of others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ARGUMENT

Petitioners file this Reply Brief in Support of their Petition for a Writ of Certiorari to call this Court's attention to a recent decision of this Court which is dispositive of petitioners' position, as well as to address the issue of waiver first raised in respondent's Brief in Opposition to Petition for Certiorari.

I. *Missouri v. Jenkins* Is Dispositive Of The Main Issue Presented In The Petition For Certiorari

Petitioners set forth in their Petition for Certiorari, as their main issue, that the chief error of the Seventh Circuit Court of Appeals was a failure to follow the dictates of this Court in examining municipal payment of debt obligations (tort or other judgments) and compelling municipalities to pay debt obligations when the taxing power was available to pay, but the municipality arbitrarily chose not to do so. Petition for Certiorari at 15-18. This Court's recent decision in *Missouri v. Jenkins*, ___ U.S. ___, 58 U.S.L.W. 4480 (4/18/90), is dispositive of the main issue presented in the Petition for a Writ of Certiorari and compels reversal of the court of appeals' decision.[1]

A. In *Evans II* The Court Of Appeals Refused To Interfere With Municipal Debt Payment and Local Taxation And Relaxed The Equal Protection Analysis

The *Evans II* court of appeals' refusal to interfere with municipal payment practices and taxation to formulate a remedy for the respondent's irrational system of payment resulted in the application of a lenient and deferential

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[1] Alternatively, this Court should vacate the opinion of the court of appeals and remand for reconsideration in light of *Jenkins*.

equal protection analysis, deviating significantly from the standard test applied by this Court. *See* Petition for Certiorari at 17. This refusal is evidenced by the *Evans II* court's description of the City's payment practice, the court's examination of *Evans I* and its examination of the *Evans II* trial proceedings. *See*, respectively, Appendix to Petition for Certiorari at 7 ("The delay in paying tort judgments stemmed from the City's practice of levying a special property tax each year to pay judgments at an amount that was far less than needed to pay the annual tally of judgments. The City refused to apply any other revenue to the payment of tort judgments."); *Id.* at 17-18 ("At worst, the City is merely attempting to satisfy as many individual claimants as possible with the limited revenues available.") and *Id.* at 20-21 ("It is not this court's province to prescribe the budgetary workings of the City of Chicago. . . . This court must avoid attempting to determine for itself whether the City is able to raise more revenue. . . . **The City's alleged failure to raise adequate revenue to quickly meet all its tort obligations does not violate equal protection.**" (emphasis supplied)).[2]

B. In *Missouri v. Jenkins* This Court Unanimously Determined That Federal Courts Are Empowered To Order Local Authorities To Exercise Taxation Powers

In *Jenkins* the majority determined that federal courts have the power to intervene and direct local governmental

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[2] The only statutory limitation on the City of Chicago's ability to raise sufficient revenue to meet its tort judgment obligations was held unconstitutional by the *Evans I* district court and affirmed by the *Evans I* court of appeals. Appendix to Petition for Certiorari at 68 n.16 & 69. The unconstitutionality of this statute was not resurrected and challenged by the City of Chicago in *Evans II*.

bodies to levy taxes. *Id.* at 4486, relying upon *Griffin v. Prince Edward County School Board*, 377 U.S. 218, 233 (1964). The dissent (per Justice Kennedy) agreed with the majority's reading of *Griffin*, to the extent it allows federal courts to order local authorities "to exercise **existing** authority to tax." 58 U.S.L.W. at 4490 (emphasis original). This Court's unanimous determination in *Jenkins*, that federal courts have the power to intervene and direct local governmental bodies to levy taxes which they are authorized but unwilling to do, compels reversal of the court of appeals' decision. *See* note 1, *supra*.

The *Jenkins* majority also relied on several earlier cases where this Court approved the issuance of a writ of mandamus compelling local governmental bodies to levy taxes to satisfy debt obligations, mostly in the form of contracts. *See* cases cited in 58 U.S.L.W. at 4486. This Court further held that federal courts have the power to set aside state imposed limitations on local taxing authority. *Id.* This holding relied in particular on *Von Hoffman v. City of Quincy*, 4 Wall. 535 (1867), where a bondholder obtained a writ of mandamus to compel the city to levy taxes to pay outstanding interest coupons.

In *Jenkins* this Court specifically followed these decisions, many of which based their Constitutional authority upon the Contracts Clause (Article I, section 10, clause 1), in the context of a Fourteenth Amendment equal protection challenge to the Kansas City School District's failure to pay its share of the costs of desegregating the area schools. The Equal Protection Clause of the Fourteenth Amendment is precisely the basis for petitioners' cause. *See* Petition for Certiorari at 1, Question Presented No. 1 & at 17-18.

This Court has long since disapproved of deference accorded to unreasonable municipal plans for payment of debt obligations[3] and *Jenkins* reaffirms that precept.[4] Indeed, in addition to the authority cited by petitioners, Petition for Certiorari at 16-17, the authority relied upon in *Jenkins* doubly supports petitioners' position. This Court's decisions evidence that contracts and debt obligations/judgments (often one in the same when a contract debt is reduced to judgment in an action) are treated similarly when enforcement is sought. See *Wolff v. New Orleans*, 103 U.S. 358 (1881) and *United States v. New Orleans*, 98 U.S. 381 (1879).

The same authority cited by this Court in *Jenkins* mandates relief for petitioners. Specifically several decisions reject arbitrary municipal payment determinations, which is the cornerstone of petitioners' cause. *Von Hoffman v. City of Quincy*, 4 Wall. 535, 552 (1879) ("Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obliga-

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[3] In *City of Galenia v. Amy*, 5 Wall. 705, 710 (1867), this Court stated:

> The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them.

[4] This deference creates the conflict between *Evans II* and *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986). Petition for Certiorari at 18. If the cases were consistent, as respondent asserts, Brief in Opposition to Petition for Certiorari at 5, then the equal protection claim in *Minton* would have been dismissed as well.

tion to fall within the class of those moral and social duties which depend for their fulfilment (sic) wholly upon **the will of the individual**." (emphasis supplied)); *Board of Commissioners of Knox County v. Aspinwall*, 24 How. 376, 385 (1861) ("The fund to pay this judgment, by the face of the contract, is a special tax laid and to be collected by defendants. They refuse to perform a plain duty."); and *Wolff v. New Orleans*, 103 U.S. 358, 363-64 (1881) (Court rejected the city's clearly arbitrary proposed method of payment of bond debts "to be determined by chance in the drawing of a lottery . . . under this arrangement, whether a creditor will be paid in one or in fifty years, will depend upon the turn of a wheel and the drawing of a lucky number").

The court of appeals ignored the dictates of this Court's determinations in allowing obviously arbitrary and irrational payment practices to survive minimal, deferential scrutiny. The court of appeals' decision was primarily motivated by its refusal to recognize the remedy of court ordered intervention in municipal payment practices and local taxation, as *Missouri v. Jenkins* permits.

II. Logic And Law Compel That Petitioners' Due Process Claim Was Not Waived

Respondent asserts that petitioners waived consideration of the due process question because it was not raised in the court of appeals as an alternate grounds for affirmance of the district court. Brief in Opposition to Petition for Certiorari at 9-10. This suggestion stretches both irony and logic beyond acceptable bounds. The irony is found in the juxtaposition of the *Evans I* court of appeals' specific finding that the very same due process question should not be addressed because the district court had not reached the issue (Appendix to Petition for Certiorari

at 44; Brief in Opposition to Petition for Certiorari at 2 n.2) and the *Evans II* court of appeals' summary disposition of the matter. *See e.g. Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court.")

It is illogical, as respondent suggests, that the court of appeals address (let alone affirm based upon) issues not reached initially because of lack of lower court findings and secondly where the district court avoided an unnecessary constitutional determination.[5] The court of appeals already notified counsel very clearly that it would not reach the due process question without a lower court ruling. Appendix to Petition for Certiorari at 54. This decision in *Evans I* was correct because both logic and law dictate that such issues of state law and mixed issues of fact and law be remanded to the lower court for full consideration. *Cf. Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n.19 (1982) (although Eleventh Amendment issue not raised in lower courts, if raised it should be determined first by district court because of issues of state law). Respondent seeks to penalize petitioners for the inconsistency of the court of appeals. Brief in Opposition to Petition for Certiorari at 10. Finally, the authority cited by respondent to support this proposition are primarily cases where the issue was not first raised in the district court.

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[5] Respondent's contemplation of appellate practice appears to include a multitude of otherwise unnecessary footnotes and brief sections on issues not addressed by the lower court. Once the *Evans I* court of appeals determined that petitioners' due process claim should be first decided in the district court, raising the issue again on the second appeal could have resulted in sanctions.

CONCLUSION

The petition for writ of certiorari should be granted, the decision of the court of appeals should be reversed in light of this Court's opinion in *Missouri v. Jenkins* and the cause remanded. *See* note 1, *supra*.

Respectfully submitted,

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